United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1942

To be argued by
MARTIN M. BAXTER

United States Court of Appeals
FOR THE SECOND CIRCUIT

MARTINO LIEGGI,
Plaintiff-Appellant,

against

REEDER-UNION AG,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S BRIEF

ZIMMERMAN & ZIMMERMAN,
Attorneys for Plaintiff-Appellant,
160 Broadway,
New York, N. Y. 10038.
227-1350

MARTIN M. BAXTER,
of Counsel.

TABLE OF CONTENTS

CASES CITED

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARTINO LIEGGI,

Plaintiff-Appellant,

against

REEDER-UNION AG,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S BRIEF

Preliminary Statement

This is an appeal by Martino Lieggi, the above-named plaintiff-appellant (hereinafter "plaintiff") from the order of the United States District Court for the Southern District of New York (Gurfein, D.J.) which granted the motion of Reeder-Union AG, the defendant-appellee (hereinafter "shipowner") dismissing plaintiff's complaint pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure to proceute and for laches.

Statement of Issues Presented by the Appeal

The question presented by this appeal is whether shipowner has been prejudiced by laches or plaintiff's delay in prosecuting the case below.

The Facts

This is a diversity action by a New York longshoreman to recover damages for personal injury sustained aboard shipowner's vessel while she was moored at a pier in Brooklyn on January 9, 1968 (4a to 9a).

Suit was commenced by the filing of a complaint on September 9, 1970 and summons was issued (1a).

On September 10, 1970 the Clerk filed a certificate of mailing summons and complaint by registered mail, return receipt No. 317318 requested, addressed to:

Reeder-Union A.G.
Holstenbrucke 2
23 Kiel
Germany

and the same was returned undelivered (10a to 13a).

Thereafter, on July 9, 1973 the clerk filed another certificate of mailing summons and complaint by registered mail, return receipt No. 453428 requested, again addressed to shipowner at the aforesaid address and this time the receipt was returned as delivered (14a to 16a).

On August 20, 1973 shipowner filed its answer setting forth various defenses (2a, 17a, 18a).

Thereafter, on January 8, 1974 shipowner filed its motion to dismiss the action below for plaintiff's failure to prosecute and for laches pursuant to Rules 41(b) and 56(b) of the Federal Rules of Civil Procedure (2a, 19a).

Shipowner alleges that by September 9, 1970, the date the complaint herein was filed (1a), shipowner "had, *in effect,* been merged into another company and no longer had any office or place of business at Holstenbruck 2, 23 Kiel, Germany" (emphasis supplied) (21a, 23a).

POINT I

The Court below is totally incorrect in its interpretation of the applicable law regarding laches and failure to prosecute.

The latest decision by this Court pertaining to the question of laches is *Hill* v. *W. Bruns & Co.*, 498 F. 2d 565 (2 Cir. 1974), reh. den. —— F. 2d ——, wherein it was held that since *defendant* failed to show it was prejudiced, there could not be any claim of *laches*. This question of prejudice, which has to be proven by the defendant, was so important, that this Court did not even go into the question of the sufficiency of the excuse for the delay by plaintiff's attorney.

Here shipowner's counsel in his own affidavit (21a) and in the affidavit he prepared for Mr. Meyer (23a) specifically limited the allegation of merger to a merger *in effect* and then gratuitously concludes that as a result of said merger *in effect* Shipowner no longer had any office or place of business at Holstenbruck 2, 23 Kiel, Germany. However, the second service by mail to the exact same address by the clerk of the court below on July 6, 1973 (14a) was received and a signed receipt given on July 16, 1973 (15a). Whereupon, shipowner filed its answer below on August 20, 1973 (2a).

Shipowner puts forward no explanation as to why the first service was returned undelivered but the second was received and indeed receipted for within ten days of mailing.

Furthermore, shipowner alleges that the absence of any log entries regarding plaintiff's accident *confirms* the supposed fact that neither the master, chief officer or any other officer of the vessel in question had any knowledge of plaintiff's accident. However, there is no allegation by shipowner that said officers were contacted and that they did, in fact, have no knowledge.

"As we said in *Larios* v. *Victory Carriers, Inc.*, 316 F. 2d at 66, to establish the defense of laches there must be proof of 'prejudice on the part of the defendant, an issue as to which the defendant, with his greater knowledge, ought be required to come forward' ", *Hill, supra,* at 568.

Plaintiff can hardly be said to be guilty of failure to prosecute when shipowner ignores or refuses the first service and then accepts the second service resulting in joinder of issue.

There is no issue as to the timely commencement of this action inasmuch as the accident occurred on January 9, 1968 (6a) and the complaint herein was filed on September 9, 1970 (1a).

In discussing dismissals for failure to prosecute, this Court in *Schwartz* v. *U. S. A.*, 384 Fed. 833 (2 Cir. 1967), stated at page 836:

> "We would, however, suggest that the Court keep in mind the possibility, in future cases of inexcuseable neglect by counsel, of imposing substantial costs and attorneys' fees payable by offending counsel personally to the opposing party, as an alternative to the drastic remedy of dismissal."

The drastic effect of the order below deprives plaintiff, who has a meritorious cause of action, from having his day in court and flies in the teeth of this Court's *Schwartz dicta. supra.*

CONCLUSION

By reason of the foregoing it is respectfully submitted that the order appealed from should be reversed.

Respectfully submitted,

ZIMMERMAN & ZIMMERMAN,
Attorneys for Plaintiff-Appellant.

MARTIN M. BAXTER,
of Counsel.

375—Affidavit of Service

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

UNTIED STATES COURT OF APPEALS, ~~For the Second Circuit~~

MARTINO LIEGGI,

Plaintiff-Appellant,

against

REEDER UNION AG,

Defendant-Appellee.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York, ss:

Harold Dudash being duly sworn, deposes and says that he is over the age of 21 years and resides at 2530 Young ave Bronx, N.Y.

That on the 23rd day of september 1974 at

he served the annexed Brief of the Plaintiff-Appellant upon Burlingham, Underwood & Lord,
in this action, by delivering to and leaving with said attorney three true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 23rd day of September 19 74

Harold Dudash

ROLAND W. JOHNSON
Notary Public, State of New York
No. 41-09705
Qualified in Delaware County
Commission Expires March 30, 19